Supreme Court, U.S.
FILED

(1) 94 536 APR 20 1995

No. 94-
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1994

ISIDOR FRIEDMAN
DOROTHY FRIEDMAN
Petitioners

vs.

PHILIP C. GRACE AND
DAVID A. SIEGEL
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DAVID A. SMYTH, ESQ.
4929 Wilshire Boulevard
Suite 988
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(213) 933-8401

38 pp

Questions Presented

1. Does a Bankruptcy Court have the authority to decide an essential element existed concerning dischargeability when the U.S. Supreme Court has decided otherwise?

2. Is it a denial of due process to not allow a Debtor the benefit from a change in a Bankruptcy statute?

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed January 27, 1995.

OPINION AND ORDERS BELOW

The opinion of the United States

Court of Appeals for the Ninth Circuit was ordered by that court not to be published and is reproduced in Appendix A, infra.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on January 27, 1995. This petition was timely filed within ninety (90) days of that date. 28 U.S.C. §2101 (C); S.Ct.R. 13.1. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit by writ of certiorari is conferred by 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISION INVOLVED

The due process clause of the 14th Amendment to the United States Constitution provides in pertinent part:

"... nor shall any state deprive any person of... property, without due process of law... "

STATEMENT OF THE CASE

On October 30, 1981, Respondents obtained a judgment against Appellants in the Central District of California in the amount of $1,406,453.88. On October 26, 1987, this debt was found non-dischargeable in a prior bankruptcy case filed by Appellants, Case No. 69-736-BR. This judgment was granted under the provision of Section 17(a) (2) of the Bankruptcy Act [formerly 11 U.S.C. 35(a)(2)]. These provisions did not include "reasonable reliance" as an essential element to a finding of non-dischargeability for fraud.

Respondents presented evidence in this first non-dischargeability case that Appellant Isidor Friedman had

signed a guarantee for a loan listing a net worth of $2.3 million but had failed to disclose he was in a Chapter 11. Respondent's evidence showed that Respondents had first refused to make the loan on the basis of Appellant's guarantee alone - but then did make the loan when Appellant brought in Robert McCulloch, whom Respondents described as "extremely strong financially".

Respondent Philip Grace testified in this first non-dischargeability proceeding that he relied and reasonably relied on Appellants' guarantee and would not have made the loan without guarantees of both Mr. McCulloch and Mr. Friedman. Appellant represented himself in the first non-dischargeability case. These facts were presented to the United States Court of Appeals for the Ninth Circuit.

On July 11, 1990, the Appellants

filed the above-entitled Chapter 7. Respondents filed a Complaint to determine the above debt to be non-dischargeable. In this Complaint, Respondents alleged that the above Judgment of Judge Russell in the prior bankruptcy was "res Judicata" on the matter.

Appellants answered.

Respondents filed a Motion for Summary Judgment on April 15, 1992, alleging that Judge Russell had made a finding of "reasonable reliance". Respondents argued that this finding made Judge Russell's Order "res judicata" despite the fact that the old statute under which the case had been tried did not require adjudication of the question of reasonable reliance.

Appellants asserted that the lack of the element of "reasonable reliance" in the old statute deprived the prior

Order of any "res judicata" effect.

The Bankruptcy Court in the above-entitled bankruptcy agreed with Respondents and granted summary judgment.

Appellants filed an appeal to the Bankruptcy Appellate Panel. That Panel issued a ruling for Respondent on the same basis as the opinion of the Ninth Circuit. Appellants filed an appeal to the United Court of Appeals for the Ninth Circuit.

It is from the opinion of the Ninth Circuit that Appellants now appeal (Appendix A).

A. Presentation and Decision of the Federal Constitutional Questions.

The same argument as is being made here was made to the lower Courts – i.e., that a decision under the prior law Section 17a of the Bankruptcy Code, is not "res judicata" under 11 U.S.C.

523 of the new Bankruptcy Code.

Although the term "due process" was not explicitly used – all arguments concerning "res judicata" are due process arguments and are recognized as such.

When "res judicata" is applied, a person is denied a (further) hearing or trial; when it is improperly applied a person in unfairly denied a hearing and denied due process.

REASONS THE WRIT SHOULD BE GRANTED

I.

THIS COURT SHOULD GRANT THE WRIT TO CLARIFY A MISCONCEPTION APPARENTLY PREVALENT IN THE INFERIOR COURTS AS TO THE APPLICATION OF "RES JUDICATA"

Both the Bankruptcy Appellate Panel and the Appellate Court misapplied the Doctrine of "res

judicata" to mean "actually litigated" instead of its true meaning, "necessary to the decision". (See "Argument" for further discussion).

This erosion of the strict meaning of the doctrine of "res judicata" resulted in a denial of due process in the case at Bench and likely will result in a similar denial in the future. (See "Argument" for further discussion).

II.

BECAUSE THE NINTH CIRCUIT AND THE BANKRUPTCY COURT APPLIED INFERIOR COURT RULINGS INSTEAD OF A CONTRARY UNITED STATES SUPREME COURT RULING AND A CONTRARY STATUTE THIS COURT SHOULD GRANT THIS WRIT TO EXERCISE ITS SUPERVISORY AUTHORITY.

(See "Argument" for further discussion).

ARGUMENT

I.

THIS COURT MAY REVIEW AN OPINION OF A LOWER FEDERAL COURT WHICH IGNORES ESTABLISHED JUDICIAL NORMS.

This Court's Rule 10 states as an important consideration for granting a writ of certiorari, the need to supervise Court of Appeal (Federal) which vary significantly from judicial norms.

II.

THE LOWER COURTS ARE INCORRECT – PRIOR TO THE NEW LAW COURTS WERE NOT CONSISTENT IN REQUIRING REASONABLE RELIANCE – THE UNITED STATES SUPREME COURT AND MANY OTHERS DID NOT REQUIRE IT.

Petitioners' argument was (and is) that the element of "reasonable reliance" was not a required element at the time of the first bankruptcy decision of non-dischargeability and so

that Judgment should not have been given "res judicata" effect in the second bankruptcy after the law changed and this element was added. See Section II, infra.

The Ninth Circuit stated,

> "Courts interpreting section 17a(2) have consistently read into the statute a requirement that a creditor's reliance be reasonable". Appendix A.

This is untrue. The only United States Supreme Court case on the subject Gerdes v. Lustgarten (1924) 45 S.Ct.107; 266 U.S. 321 did not require "reasonable reliance".

> "We think that these two cases embody, in substance, the rule that should be here applied. Under the Bankruptcy Act the

> discharge is to be denied if it is shown that the bankrupt 'obtained money or property on credit upon a materially false statement in writing, made by him... for the purpose of obtaining credit.' The only essentials to the statutory bar, in so far as relates to the present question, are: (a) That the written statement was made for the purpose of obtaining credit; (b) that it was materially false; and (c) that the credit was obtained upon it."

Gerdes v. Lustgarten (1924) 266 U.S. 321-326.

This Court listed the elements for non-dischargeability and did not list

reasonable reliance as an element.

Other courts interpreting Gerdes v. Lustgarten, supra, felt the Supreme Court was not requiring reliance.

> "It is clear from the language of the statute that the purpose of Congress was to prevent any person from falsifying in writing his financial condition and thereby obtaining money or property on credit, or an extension or renewal of credit without suffering the consequential penalty of being denied the privilege of discharging his debts in bankruptcy. The objective was to prevent benefit from fraud or fraudulent falsification in commercial

> or any other sort of business transactions. A court of equity in protecting the rights of all creditors of a bankrupt will not shield dishonesty. The technical argument made here that the party objecting to the discharge had knowledge that the fraudulent misrepresentation in writing was untrue or even connived with the bankrupt should not be seriously considered."

Cunningham v. Elco Distributors (6th cir. 1951) 189 F.2d 87, 89 which cited Gerdes, supra, as authority for the above.

Or see, Matter of Garmen (1980) 643 F.2d 1252, 1259 where Gerdes, supra is

quoted (same passage as here). The Court in Garmen states:

> "The present issue for the court is simply whether the bankrupt obtained credit, or a renewal, through the creditor's reliance on a materially false financial statement containing information apparently sufficient to obtain an accurate picture of the debtor's financial condition with regard to a reasonable decisional factor in the loan decision, filed by the debtor with the intent to deceive the creditor. The creditor need establish only its reliance in fact, although its claims to

> reliance cannot be so unreasonable as to defeat a finding of reliance in fact."

Garmen, supra, at 1258. Only reliance in fact is needed – not reasonable reliance.

The case of In re Culp (BK N.D. Okla. 1992) gives a good history of the element of "reasonable reliance" and non-dischargeability as the following quote shows. While the Supreme Court only required actual reliance the lower courts in many cases were only playing "lip service" to the requirement of "reasonable reliance".

> "One group simply inquired whether a creditor actually relied on a debtor's false representations, e.g. In re Kaplan, 141 F.463 (E.D.Pa.1905), In re Jaffe,

20 F.2d 370 (2nd Circ. 1927), International Shoe Co. v. Kahn, 22 F.2d 131 (4th Circ. 1927), In re Hochberg, 17 F.Supp.916 (W.D. Penn. 1936), In re Livermore, 96 F.2d 93 (2nd Circl 1938) Crue v. Timmer, 119 F.2d 415 (6th Circ. 1941), Eline v. Richard, 296 Ky. 283, 176 S.W. 2d 697 (1943), reh. den. 1944), In re Savarese, 56 F. Supp. 927 (E.D.N.Y. 1944), Banks v. Siegel, 181 F.2d 309 (4th Circ. 1950), Rustuen v. Apro, 40 Wash.2d 395, 243 P.2d 479 (1952), Industrial Bank of Commerce v. Bissel, 219 F.2d 624 (2nd Circl 1955), In re Freeman, 131 F. Supp. 437

(S.D. Cal. 1955), M-A-C Loan Plan, Inc. v. Crane, 4 Conn. Cir. 29, 225 A.2d 33 (1966).

The U.S. Supreme Court directed lower courts to concentrate on the reality rather than the propriety of reliance. In Gerdes v. Lustgarten, 266 U.S. 321, 326, 45 S.Ct.107, 109, 69 L.Ed.309, 312 (1924), the Supreme Court held that, where a debtor had succeeded in misleading a creditor by inducing actual reliance upon a false statement, 'it does not lie in his mouth to say that, by reason of extrinsic circumstances, the creditor was not justified in

relying upon it.' The Supreme Court's directive was followed by the Court of Appeals of this Circuit, which treated reliance simply as a matter of 'proximate result' or 'actual ... effect' ..., Mullen v. First Nat'l Bank of Ardmore, Okl., 57 F.2d 711, 712, 713 (10th Circ. 1932), or 'proximate cause,' 407 F.2d 16, 19 (10th Circ. 1969); and see In re Vickers, 577 F.2d 683, 687 (10th Circ. 1978). A fourth group of cases neglected the Supreme Court's ruling in Gerdes v. Lustgarten, and continued to speak of 'reasonable' as distinct from 'actual'

reliance, though in terms that were ambiguous, confusing and perhaps confused, e.g. In re Matera, 436 F.Supp.947 (E.D. Wis. 1977), In re Smith, 424 F. Supp. 858 (M.D. La. 1976), Kentile Floors, Inc. v. Winham, 440 F.2d 1128 (9th Circ. 1971). A line of cases developed in the 7th Circuit which gave lip service to a separate requirement of "reasonableness', yet applied it in such a way that it amounted to nothing more than the usual requirement of actual reliance, Carini v. Matera, 592 F.2d 378 (7th Circ. 1979), In re Garman, 643 F.

2d 1252 (7th Circ. 1980), cert. den. 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed.2d 333 (1981).

In Re Culp (BK. N.D. Okla. 1992), 140 B.R. 1005, 1010-1012.

III.

THE FIRST BANKRUPTCY PRIOR ORDER WAS NOT ENTITLED TO BE GIVEN RES JUDICATA (OR ISSUE PRECLUSION) EFFECT.

For res judicata or the related doctrine of issue preclusion, the following elements must apply:

(1) The issue at stake is identical to that involved in the prior litigation;

(2) The issue was actually litigated in the prior litigation;

(3) The issue was determined by valid and final judgment;

(4) The determination of the issue in the prior litigation was

essential to the judgment in the earlier action;

(5) The standard of proof in the prior litigation was at last as high as in the present litigation. Spilman v. Harley, 656 F.2d 224, 228 (6th Cir. 1981).

In the case at Bench, Item No. 4 does not apply. A finding of "reasonable reliance" was not necessary to the first non-dischargeability Order, even though the Judge made such a finding. Appellants did not have the incentive to fully litigate this issue as it was not an essential element to a judgment under the prior bankruptcy statutes.

Because the Respondents did not make the loan in question based on only Appellants' guarantee, but waited until Appellants had brought in a new investor, described as "extremely

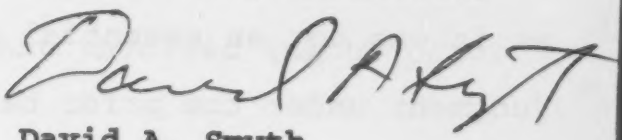
strong" by Respondents, it seems that Appellants should have been allowed to benefit from the change in the law concerning "reliance" by lenders.

CONCLUSION

This Court should grant review to exercise its supervisory function.

The lower courts clearly misstated the state of the law regarding non-dischargeability prior to 1978 and ignored controlling U.S. Supreme Court precedent.

Respectfully submitted,



David A. Smyth

Appendix A.

Opinion of the Ninth Circuit

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 27 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

IN RE: ISIDOR FRIEDMAN AND DOROTHY FRIEDMAN, Debtor.	)
Isidor Friedman; Dorothy Friedman, Appellants,	)
v.	) No. CA 93-55823) BAP No. CC-91-01974 OpV
Philip C. Grace; David A. Siegel, Appellees.	) MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Lawrence Ollason, Bankruptcy Judge
Elizabeth L. Perris, Bankruptcy Judge
Sidney C. Volinn, Chief Bankruptcy Judge

Submitted January 12, 1995**
Pasadena, California

Before: CANBY AND NOONAN, CIRCUIT JUDGES AND KING*** DISTRICT JUDGE.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

*** The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

Because the parties are familiar with the facts of the case, we will not recite them here. The bankruptcy court correctly concluded that all elements necessary for the doctrine of res judicata to operate were met, and thus did not err in granting Grace's motion for summary judgment on the issue of non-dischargeability. We therefore affirm the Bankruptcy Appellate Panel's decision.

Grace and Siegel filed their original objection to discharge in the first Friedman bankruptcy pursuant to the then-applicable non-dischargeability statute, section 17 (a) (2) of the Bankruptcy Code, 11 U.S.C. §35(a)(2) (1976). Section 17(a)(2) provided that a discharge in bankruptcy would not release a bankrupt from

liabilities for obtaining money

> or property by false pretenses of false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner with intent to deceive...

Id. (emphasis added).

In 1978, Congress enacted 11 U.S.C. §523 to succeed section 17(a) in determining non-dischargeability of debts in bankruptcy. Section 523(a)(2)(B)(iii) now explicitly requires that the creditor reasonably rely on debtor's false financial statement before a debt is judged non-dischargeable. When Grace and Siegel filed their objection to discharge of debt during the second bankruptcy

proceeding in 1991, their claim was governed by this successor non-dischargeability statute.

Friedman argues that section 523 added a new element to the cause of action for non-dischargeability because the language of section 17(a)(2) explicitly required only a creditor's reliance, regardless of his reasonableness. Because the statute did not on its face require Grade to prove that his reliance was reasonable, Friedman asserts that he did not vigorously resist Grace's proof thereof. According to Friedman, then, the reasonableness of Grace's reliance was not "fully and fairly litigated" in the first proceeding, and res judicata should not here apply. Friedman, however, has mistaken the law.

Courts interpreting section

17(a)(2) have consistently read into the statute a requirement that a creditor's reliance be reasonable. Carini v. Matera, 592 F.2d 378, 381 (7th Cir. 1979); In re White, 130 B.R. 979, 986 (Bankr. D. Mont. 1991); In re Howarter, 95 B.R. 180, 191 (Bankr. S.D. Cal. 1989). Congress in fact enacted section 523(a)(2)(B)(iii) to codify these and other cases similarly interpreting section 17(a)(2). See In re Kreps, 700 F.2d 372, 276 (7th Cir. 1983); see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) ("[T]he creditor must not only have relied on a false statement in writing, the reliance must have been reasonable. This codifies case law construing [section 17(a)(2)].").

Friedman thus is incorrect in arguing that section 523(a)(2)(B) adds

any new element of proof to the non-dischargeability standard. Reasonableness of reliance was a necessary element under the predecessor statute, section 17(a)(2), and was fully and fairly litigated in the proceedings on Grace's first objection to discharge of debt. The records demonstrates that Grace there put into issue and proved his reasonable reliance on Friedman's financial statement. ER at 59-60.

Friedman reminds us that he tried the non-dischargeability issue in the first proceeding pro se, and pleads ignorance, due to his unfamiliarity with the law, of the judge-made reasonableness requirement. While it is unfortunate that his attorney withdrew shortly before the proceeding, Friedman voluntarily chose to continue on his

own, and will not now be heard to complain. See Jacobson v. Fuller, 790 F.2d 1362, 1365 n.5 (9th Cir. 1986)).[1]

AFFIRMED.

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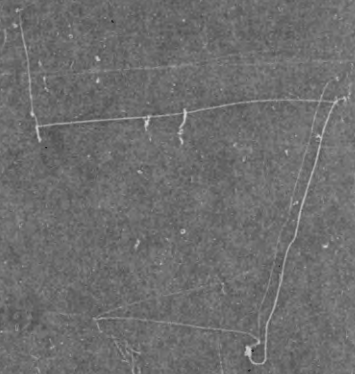
[1] ("The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds pro se with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an "advocate" for or to assist and guide the pro se layman through the trial thicket.") Quoting United State v. Pinkley, 548 F.2d 305 (10th Cir. 1977).



Appendix B.

Sworn Statement of Attorney David A. Smyth that no judgement was issued by Ninth Curcuit

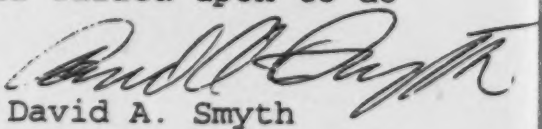
Declaration of David A. Smyth, Esq.

David A. Smyth, Esq.
4929 Wilshire Boulevard
Suite 988
Los Angeles, CA. 90010
(213) 933-8401

I declare under penalty of perjury
1. I am an attorney licensed to practice before the U.S.Supreme Court.

2. I have called the 9th circuit and found there is no separate judgement entered in the case of Isidor Friedman vs. Philip C. Grace and David A. Siegel No. 93-55823.

3. I could testify to the above from personal knowledge if called upon to do so.



David A. Smyth

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PETITION FOR WRIT OF CERTIORARI

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Attorneys for Plaintiffs
PHILIP C. GRACE and DAVID A. SIEGEL

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re	Bankruptcy No.:
ISIDOR FRIEDMAN and DOROTHY FRIEDMAN,	LA 90-14397-JD
Debtor(s)	Adversary No.:
	LA 90-1547-JD
	Chapter 7
PHILIP C. GRACE and DAVID A. SIEGEL,	JD Judgement
Plaintiff(s)	
vs.	DATE: May 7, 1991
	TIME: 2:00 p.m.
ISIDOR FRIEDMAN and DOROTHY FRIEDMAN,	PLACE: Courtroom of the Honorable James M. Dooley
Defendant(s)	
	TRIAL DATE: None

Having fully considered motion of plaintiffs Philip C. Grace and David A. Siegel for Summary Judgment, the papers filed concurrently herewith, the documentary evidence presented, all the pleadings on file, the Declaration of

Rick D. Navarrette and Plaintiffs' Request for Judicial Notice, and upon oral argument presented at the hearing of this matter:

IT IS ORDERED, adjudged and decreed that the judgment of Plaintiffs Philip C. Grace and David A. Siegel entered in the United States District Court for the Central District of California, Case No. CV 77-4357 MRP, and excepted from discharge pursuant to the provisions of Section 17A(2) of the Bankruptcy Act (former 11 U.S.C. Section 35A(2)) on October 26, 1987, is hereby determined to be nondischargable under SEction 523(A)(2) of the Bankruptcy Code.

DATED: SEP 20 1991, 1991

James M. Dooley
James M. Dooley

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am over the age of eighteen (18) and not a party to the within action; my business is 801 South Grand Ave., Suite 400, Los Angeles, California 90017.

On August 8, 1991 I served the foregoing document described as (PROPOSED) JUDGMENT on the interested parties in this action by placing a true copy thereof in sealed envelopes addressed as follows:

See attached mailing list

I caused such envelopes to be deposited in the mail at Los Angeles, California. The envelopes were mailed with postage thereon fully prepaid.

I am "readily familiar" with the firm'S practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 8, 1991, Los Angeles, California.

Marisela A.H. Fahraji
Marisela A.H. Fahraji

In re: Isidor Friedman and Dorothy Friedman, Debtors

Phillip C. Grace and David A. Siegel, Plaintiffs,
v.
Isidor Friedman and Dorothy Friedman, Defendants.

UNITED STATES BANKRUPTCY COURT - CENTRAL DISTRICT
Chapter 7, Case No. LA 90-14397JD
Adversary No. 90-01547JUD

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(3)

95-536

Supreme Court, U.S.
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IN THE SUPREME COURT

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ISIDOR

DOROTH

PETITIONERS

VS.

PHILIP C. GRACE AND

DAVID A. SIEGEL

RESPONDENTS.

PETITIONER

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ATTORNEYS

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Wilkinson v. U.S. (1961)
8 S. Ct. 567, 365 U.S. 399 2

Statutes

Bankruptcy Act [illegible] (2) 1

In the Supreme Court
of the United States

Isidor Friedman
Dorothy Friedman
Petitioners
vs.
Philip C. Grace and
David A. Siegel
Respondents

Petitioners' Reply Brief

I.

THE ISSUES RAISED ARE NOT NARROW –
THE ISSUES ARE:
COMPLIANCE WITH THE UNITED STATES
SUPREME COURT DECISIONS
AND APPLICATION OF "RES JUDICATA"

A. The Bankruptcy Court Has Not Complied With the Controlling United States Supreme Court Opinion

A reading of Matter of Garman, 643 F2d 1252 (7th Cir. 1983) and the In re Krep, 700 F2d 372 (7th Cir. 1983) indicates the lower courts were adding elements needed to prove non-dischargability which neither the statue nor the courts decision in Gerdes v. Lustgarden, 266 U.S. 321 contained. In Garman, only actual reliance is said to be required at p. 1258 – in Kreps, the court goes further. This requires "reasonable" reliance at p. 375. This is judicial legislation, as neither this court nor the statute (Bankruptcy Act 17(a)(2)) contained such a requirement. Further, these are 7th Circuit cases, not binding on the Bankruptcy Court in the case at bench in the 9th Circuit, while the Court's decision in Gerdes, 266 U.S. 321 is binding.

The fact is that prior to this

Court's opinion in Gerdes, 266 U.S. 321, reasonable reliance was not required by this Court or a lower court. See Forsyth v. Vehmeyer at 623, 177 U.S.; Strange v. Bradner, 5 S. Ct. 1038, 114 U.S. 555; Tindle v. Biriett, 27 S. Ct. 493; In re Bloemecke, 265 F343; In re Lewensohn, 104 F. 1006 and numerous other opinions. The Court's opinion in Gerdes confirmed this.

How then can the lower courts change a United States Supreme Court ruling by interpreting to include new elements? They cannot. This Court apparently needs to make this clearer. United States Supreme Court Rule 17.1(a) – the exercise of supervisory power is an important consideration favoring the granting of a writ. See Egan v. City of Aurora, Illinois, (1961) 81 S. Ct 684, 365 U.S. 514, where review was granted because a lower court decided a case based in a view inconsistent with the view taken by this Court. Also see, Wilkinson v. U.S., (61) 8 S. Ct. 567, 365 US 399.

B. This Court Should Grant Review to Clarify "Res Judicata"

Respondents' brief indicates how easily res judicata can be misinterpreted. Respondents are using the argument of "actually litigated" as the equivalent of "necessary for the judgment." As indicated by the Petition for Certiorari, the doctrine of res judicata requires an issue be

"necessary for the judgment." However, it is easy to see how the doctrine will tend to be relaxed in practical application as Respondents are arguing. Because due process requires a full hearing on essential elements, this relaxed standard should be guarded against. A review by this Court will thus have a broad effect on all cases involving res judicata.

II.

RESPONDENTS' ARGUMENTS THAT BECAUSE RESPONDENTS PROVED "REASONABLE RELIANCE" THE DOCTRINE OF RES JUDICATA IS SATISFIED HAS NO LEGAL BASIS

Respondents have cited no authority for their position that because Respondents set forth evidence for reasonable reliance, the doctrine of res judicata is satisfied. See Page 5, Respondents' Brief in Opposition. This is not a factor in assessing whether res judicata applies.

III.

PETITIONERS HAVE HAD NO OPPORTUNITY TO PRESENT EVIDENCE OF REASONABLE RELIANCE

Once res judicata is invoked and accepted as in the case at Bench, the

party against whom it is invoked has no opportunity to present other evidence. The first judgment in essence becomes the judgment in the pending case resulting in Petitioners not having "due process" (ie a full hearing) on the most recent adversary compliant by Respondents.

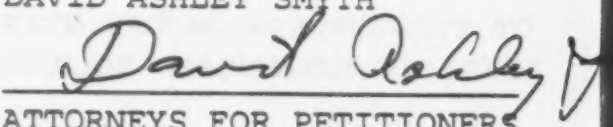
IV.

LOWER COURTS CANNOT INTERPRET THE SUPREME COURT'S INTENTION WHEN THIS COURT LISTED ONLY CERTAIN ELEMENTS FOR NON-DISCHARGABILITY AND BY THIS INTERPRETATION ADD ELEMENTS

Respondents' arguments (Page 5) illustrate the need for this Court's supervision of the lower courts. The elements of a cause of action are basic. When this Court listed these elements for non-dischargability and others (Gerdes v. Lustgarden, 266 U.S. 321) there was no ambiguity that needed resolving by the lower courts. There was certainly no room for lower courts to interpret and then add elements--such a procedure undermines a judicial system based on superior and inferior courts. And in such a system, the higher and highest court must at times exercise its supervisory capacity. The exercise will be beneficial to the whole system and is a reason this petition should be granted.

Respectfully submitted,

NOV. 3, 1995 DAVID ASHLEY SMYTH



ATTORNEYS FOR PETITIONERS